

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JESUS DELGADO-AVALOS,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

Cr. No. 08-2389GT

Cv. No. 10-2110GT

ORDER

On October 6, 2010, Petitioner, Jesus Delgado-Avalos ("Mr. Delgado"), filed a Motion to Vacate, Set Aside or Correct Sentence, pursuant to 28 U.S.C. § 2255. Mr. Delgado argues that his counsel was ineffective for a variety of reasons. The Court has fully considered this matter, including a review of Mr. Delgado's brief filed, the authorities cited therein and the arguments presented. For the reasons stated below, Mr. Delgado's Motion to Vacate, Set Aside or Correct Sentence is **DENIED**.

First, Mr. Delgado pled guilty, pursuant to a written plea agreement, to three counts of Illegal Entry, in violation of 8 U.S.C. § 1325. In the written plea agreement, Mr. Delgado explicitly waived his right to appeal and/or collaterally attack his conviction or sentence. The Ninth Circuit has long acknowledged that the terms of a plea agreement are enforceable. *See, United States v. Baramdyka*, 95 F.3d 840, 843 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 1282 (1997). Since Mr.


1 Delgado expressly waived his statutory right to appeal or collaterally attack his sentence in his plea
2 agreement, Mr. Delgado is now precluded from challenging that sentence pursuant to 28 U.S.C.
3 § 2255. *See, United States v. Abarca*, 985 F.2d 1012, 1014 (9th Cir. 1993) (holding that a
4 knowing and voluntary waiver of a statutory right is enforceable).

5 Moreover, even if Mr. Delgado had not expressly waived his right to appeal or collaterally
6 attack his sentence, his petition would still fail. In essence, Mr. Delgado argues that his counsel
7 was ineffective for a variety of reasons. In order to prevail on a claim of ineffective assistance of
8 counsel, a petitioner must show that counsel's performance was deficient and that this deficient
9 performance prejudiced the petitioner. *Strickland v. Washington* 466 U.S. 668, 687 (1984). The
10 petitioner must show that but for counsel's errors he would not have pled guilty and would have
11 insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52 (1985). Mr. Delgado has made no showing
12 that he would have gone to trial but for the errors of his counsel. In fact, Mr. Delgado signed a
13 written plea agreement which recommended the 48 month sentence that he received. Accordingly,

14 **IT IS ORDERED** that Mr. Delgado's Motion to Vacate, Set Aside or Correct Sentence is
15 **DENIED.**

16 **IT IS SO ORDERED.**

17
18 11-8-11
19 date

20 
GORDON THOMPSON, JR.
United States District Judge

21 cc: AUSA Bruce Castetter

Petitioner